

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTIANA MARINE SERVICE	:	
CORPORATION,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
SEABOARD SHIPPING CORPORATION,	:	
MORAN TOWING CORPORATION, AND	:	NO. 96-8705
MORAN SERVICES CORPORATION	:	

M E M O R A N D U M

Padova, J.

September 10, 1997

Plaintiff Christiana Marine Service Corporation ("Plaintiff") was engaged in the business of delivering oil to customers by barge in the ports of Baltimore, Philadelphia, the Delaware River, and the Chesapeake Bay. Pursuant to a written charter party (hereinafter "Charter"), Defendant Seaboard Shipping ("Seaboard")¹ chartered the oil tank barge New Jersey to Plaintiff. Before the Court is Defendants' Motion for Partial Summary Judgment as to Plaintiff's claim for consequential damages. For the reasons that follow, Defendants' Motion is denied.

¹Defendant Seaboard Shipping is a subsidiary of Defendant Moran Towing. (Defendants' Answer at ¶ 7.) It is unclear what the relationship is between Moran Services Corporation and the other Defendants.

II. FACTS

The following facts are undisputed. On or about June 28, 1993, Plaintiff entered into a Charter with Seaboard for the oil tank barge New Jersey. The Charter provides as follows: "The barge shall be delivered 'AS IS' without any representation or warranty expressed or implied with respect to said barge or her condition or that of her machinery, equipment, tackle, fittings, outfits, appliances or apparel, (hereinafter sometimes collectively referred to as 'equipment')." (Charter at ¶ 1.) By the terms of the Charter, Seaboard's liability was limited as follows: "OWNER [Seaboard] shall be responsible for the cost of repairs or renewals to the barge occasioned by latent defects in the barge or her equipment existing at the time of delivery under the Charter, which defects are not discovered on the [inspection] survey, but in no event shall the OWNER be liable for consequential damage flowing from such latent defects." (Id.) In August 1993, Plaintiff took delivery of the barge.

Plaintiff alleges that the pumps on the barge were defective because the contents of the barge could not be pumped out sufficiently. (Complaint at ¶ 12.) Plaintiff seeks recovery of the costs of repairing the allegedly defective pumps. (Id. at ¶ 21.) In addition, Plaintiff asserts a claim in excess of \$250,000 for "loss of business and business opportunities." (Id. at ¶ 24.) The parties do not dispute that damages for "loss of

business and business opportunities" constitute consequential damages within the meaning of the Charter.

III. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if there is sufficient evidence upon which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is "material" if it might affect the outcome of the case. Id. Upon a showing that there are no genuine issues of material fact as to a particular claim or defense, the Court may grant summary judgment in the moving party's favor "upon all or any part thereof." Fed.R.Civ.P. 56 (a) and (b).

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material

fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S.Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552.

III. DISCUSSION

Defendants seek partial summary judgment on Plaintiff's claim for consequential damages. Defendants argue that all losses of business or business opportunities allegedly suffered by Plaintiff in connection with its loss of use of the barge are barred by the express and unambiguous terms of the "as is" contract entered into between Plaintiff and Seaboard.

Plaintiff argues that Defendants knew that the pumps on the New Jersey were defective and knew the use that Plaintiff intended for the New Jersey. Plaintiff contends that despite this knowledge, Defendants both failed to inform Plaintiff of the defects in the pumps and made misrepresentations concerning the

capabilities of the barge. Plaintiff argues that issues of fact exist as to whether Defendants acted in bad faith and are thereby estopped from enforcing the Charter's provision excluding recovery of consequential damages.

A. New York Law Applies

The Charter includes the following choice of law provision: "This Charter Party shall be subject to the laws of the State of New York." The Court finds, and the parties agree, that New York law governs the interpretation of the Charter.

B. Under New York Law, Consequential Damages Can Be Contractually Limited

New York law provides, and the parties agree, that consequential damages can be limited or excluded by contract; such a limitation or exclusion does not offend public policy. Corinno Civetta Const. Corp. v. City of New York, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986); Castagna & Son, Inc. v. Board of Educ. of City of New York, 173 A.D.2d 405, 406, 570 N.Y.S.2d 286, 287 (1991).

C. Under New York Law, a Defendant is Estopped from Enforcing a Damages Limitations Clause if the Defendant Acted in Bad Faith

Although parties can freely contract to limit or exclude consequential damages, New York law also provides, and the parties agree, that such clauses will not be enforced if the defendant acted in bad faith. See Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F.Supp. 1442, 1458 (S.D.N.Y. 1986)("[a] defendant may be estopped from asserting a contractual limitation of consequential damages if the defendant has acted in bad faith."). In Castagna & Son, the plaintiffs were contractors who brought suit against the New York City Board of Education to recover consequential damages resulting from alleged delays caused by changes made by the Board to the contract specifications for the construction of a high school. The plaintiffs alleged, inter alia, that the Board deliberately concealed from them the Board's knowledge that the plans and specifications for the project were defective and not in compliance with Board of Education standards and building codes. The Board sought to escape liability for consequential damages by relying on a no-damages-for-delay clause in the contract between the plaintiffs and the Board. The court denied the Board's motion for partial summary judgment barring delay damages because it found, inter alia, that the plaintiffs had "presented sufficient evidence to raise triable issues of fact as to whether the delay damages were caused by the Board's bad faith, or its wilful, malicious or grossly negligent conduct with respect to

its performance under the parties' contract. . . ." Castagna & Son, 173 A.D.2d at 406, 570 N.Y.S.2d at 287. Therefore, if Plaintiff can meet its burden by making a factual showing that Defendants acted in bad faith or engaged in willful, malicious or grossly negligent conduct, then Defendants' Motion must be denied.

D. Genuine Issues of Fact Exist as to Whether Defendants Acted in Bad Faith

As evidence of Defendants' bad faith, Plaintiff submits the affidavit of its president, William S. Bates,² the transcript of the deposition of Mr. Bates, the transcript of the deposition of James S. Dickey, and excerpts from the transcript of the

²Defendants object to the Bates Affidavit as not being based on personal knowledge or direct proof and as containing "unfounded hearsay and speculation." Reply at 2. Defendants fail to file objections to specific portions of the Bates Affidavit, but instead seek to have the Court disregard the entire Affidavit. The Court finds that the Affidavit contains statements that are not based on Mr. Bates' personal knowledge. For the purposes of this Motion, the Court has disregarded all statements contained in the Affidavit that are not based on Mr. Bates's personal knowledge. Fed.R.Evid. 602. Despite the inclusion of certain inadmissible statements, much of the Affidavit is based on Mr. Bates's personal knowledge and is relevant to Plaintiff's contention that Defendants acted in bad faith. With respect to Defendants' hearsay objection, although the Affidavit contains certain statements made by representatives of Moran to Mr. Bates before the Charter was signed, these statements are non-hearsay admissions by a party-opponent, pursuant to Fed.R.Evid. 801(d)(2) and are admissible. Therefore, Defendants' request that the Court disregard the Bates Affidavit in its entirety is denied.

deposition of Don Glenn. Defendants also have submitted excerpts from the Glenn deposition transcript.

According to Bates, prior to signing the Charter, he met with Moran representatives Bruce Richards and Malcolm MacLeod in June 1993 to discuss the possibility of chartering the barge New Jersey. (Bates Affidavit at ¶ 3.) During these discussions, he explained to Richards and MacLeod "the nature of the contemplated use of the barge." (Id. at 4.) Plaintiff needed a barge suitable for black oil, dock to dock work, and ship bunkering service. (Bates Deposition at 24 and 139.) Both Richards and MacLeod told Bates that the New Jersey was fit for the type of services that Bates had described to them. (Bates Affidavit at ¶ 4; Bates Deposition at 24 ("As a result of those discussions Bruce Richards in his responses indicated the barge was suitable for that work and that work was acceptable by Moran for the barge."); Bates Deposition at 138 ("[H]e [Bruce Richards] informed us that we would do very well with the barge, that the barge would do very well for the company, that it would be a very good piece of equipment for our business."); Bates Deposition at 141.) Bates "knew that Moran was also in the business of transporting black oil by barge and that the Barge New Jersey had been used by Moran in that capacity for some time." (Bates Affidavit at ¶ 4; Bates Deposition at 139 ("Bruce Richards told me about the service that [sic] barge had been in [while Moran

operated it], similar service doing bunker work in New York Harbor and doing dock-to-dock work"); Bates Deposition at 203.)

During Bates's discussions with Richards and MacLeod before the Charter was executed,

[n]othing was stated regarding any inadequacies of the barge or its equipment, including the pumps. In particular, no statements were made to the effect that steaming of the barge was required as part of its normal operation. If this information had been given to me, I would not have chartered the barge because of CMS's inability to meet the special requirements of the barge.

(Bates Affidavit at ¶ 5.) Bates states that he "knew Moran to be a reputable operator with whom we had dealt over the years."

(Id. at ¶ 5.) For this reason, he accepted the assertions of Richards and MacLeod that the barge would meet the needs of plaintiff and "agreed to accept the barge in 'as is' condition."

(Id.) Bates identified the major problem with the barge as its "inability to strip its cargo and the abnormally long discharge time." (Id. at ¶ 7.)

As problems with the barge began to appear and worsen, Bates complained to Richards. Richards told Bates that Moran never had had problems with the barge. (Bates Deposition at 97.) Bates later "learned that other Moran employee [sic] knew the barge has problems striping [sic] its cargo and had slow discharge rates. We also learned that the barge could not be striped [sic] without

the use of steam." (Bates Affidavit at ¶ 7.)³

The Court finds that there is sufficient circumstantial evidence contained in the submissions upon which the trier of fact could draw the inference that Defendants acted in bad faith. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986)(in deciding a summary judgment motion, all evidence and inferences to be drawn from the evidence must be considered in a light most favorable to the non-moving party). Genuine issues of material fact exist as to whether Defendants misrepresented and/or deliberately concealed the capabilities of the barge New Jersey, thereby estopping Defendants from enforcing the Charter provision excluding consequential damages. Castagna & Son, 173 A.D.2d at 406, 570 N.Y.S.2d at 287. For this reason, Defendants' Motion for Partial Summary Judgment will be denied.

An appropriate Order follows.

³Both parties have submitted excerpts from the transcript of the deposition of Don Glenn, who was employed at Christiana Marine and who, along with William Bates, had discussions with representatives of Moran concerning the charter of New Jersey. The Court finds that, for the purposes of deciding Defendants' Motion for Partial Summary Judgment, the testimony of William Bates is sufficient to raise a triable issue of fact concerning the alleged misrepresentations made by Moran concerning the barge.